RENONG BHD.

v.

ROSLIN ABDUL AZIZ & ANOR.

HIGH COURT, KUALA LUMPUR
DATUK WIRA L.C. VOHRAH J.
[CIVIL SUIT NO. C-6648 OF 1985]
28 OCTOBER 1993

CONTRACT: Construction and interpretation of clauses in an agreement - Parties enter into an agreement with intent to developing a piece of land - Approval of Town Council sought - Conditional approval given - Variations in agreement involve extra expense - Whether variations entitle party to terminate agreement ipso facto on grounds variations were material variations - Counterclaim for specific performance - Alternative counter claim for indemnification against loss and damage.

WORDS & PHRASES: Meaning to be ascribed to term "material".

The plaintiff is a housing developer and entered into an agreement with the defendants whereby the defendants, who owned 250,000 issued shares beneficially in the company, Vegas Industries Sdn. Bhd. ("Vegas"), agreed to sell 71% of the shareholding in Vegas to the plaintiff. Vegas in fact was the registered owner of 2 lots of land and the agreement was in effect an agreement for the development of the two lots. Vegas submitted the layout plan for approval and on 29 July 1985, the plan was approved on certain conditions to be fulfilled, in particular conditions relating to access and drainage. The plaintiff was not happy with these conditions or variations and wrote to the first defendant on 8 August 1985 directing that an appeal be filed before the expiry of the extension period granted by the plaintiff and stipulated in the agreement, that is, an extension of 2 months until 28 September 1985.

The defendants failed to obtain the approval of the Town Council according to the plaintiff's proposed plans and the plaintiff terminated the agreement on 2 October 1985 and declared it null and void. The plaintiff brought 2 suits - in the first, the plaintiff sued the defendants for a return of the 30% of the purchase price already paid to the defendants, contending that the new conditions laid down by the Council constituted material variations to the agreement between the parties which were unacceptable to plaintiff, the consequence of which the agreement was deemed terminated *ipso facto*. The defendants counterclaimed for specific performance or alternatively for indemnification against all loss and damage by way of diminution on the return of their shareholdings in Vegas. In the second suit, the plaintiff sued Vegas. However, no defence was filed by Vegas.

Held:

[1] The determination of the issue as to whether the approvals for the lot as provided for in the agreement were obtained within the deadline of 28 September 1985 was a matter of construction and lay simply in the interpretation of the proviso to clause 4.01. In reviewing the language used, there cannot be discovered any ambiguity in the language. The proviso was plainly worded to mean that if either party was of the view as a matter of subjective reality that the condition or variation was material, it was entitled to put an end to the agreement and have its money back. This understanding between the parties was also clearly evidenced by the first defendant's letter of 30 July 1985 which asked for an indication whether the new conditions were acceptable to the plaintiff.

[2] In considering the maning to be given to the adjective "material", it must be the meaning ascribed to it in ordinary parlance to describe something as "substantial", "essential", "relevant" or "significant". In so far as either party genuinely considered a condition or variation as material, it must be viewed as a substantial condition or variation.

[3] It was within the **subjective** discretion of the plaintiff to regard the conditions imposed by the Town Council as material as they imposed extra financial expenditure and additional physical effort on the part of compliance by the plaintiff. There was no evidence of bad faith, disonesty or capriciousness on the part of the plaintiff to nullify any genuine dissatisfaction from them on the material variations imposed. The approval on the appeal was also not obtained within the time limit specified.

[4] The plaintiff was entitled to termiate the agreement *ipso facto*. The defendants are ordered to return the 30% of the purchase price with interest and as a consequence of this finding, the defendants prayers for relief fail. With regard to the second suit, there were monies advanced by the plaintiff to Vegas whilst

it had management of Vegas. Judgment is accordingly entered for the amoount specified in the exhibit PB7 with interest. Costs are also to be paid by Vegas.

[Judgment for plaintiff as abovestated].

Cases referred to:
Andrews v. Belfield [1857] 2 CBNS 779 ***(refd)***
Diggle v. Ogston Motor Company [1915] 84 LTR Vol. 1029 ***(refd)***
Docker v. Hyams [1969] 1 WLR 1060 ***(refd)***
Prudential Assurance Co. Ltd. v. Newman Industries & Ors. (No. 2) [1982] 1 Ch. 204 ***(refd)***

For the plaintiff - R. Lazar (A. Joyrama & Maidzura Mohamed with him); M/s. Shearn Delamore & Co.
For the defendant - P. Yip (P.K. Chong with him); M/s. Peter Yip & Yong

JUDGMENT

L.C. Vohrah J:
The plaintiff company ("Renong") is a public listed company which at the material time carried on business substantially as a housing developer. The defendants in the first suit, Roslin Abdul Aziz and Baharum Abdul Rahman ("the defendants"), were equal beneficial owners in the 250,000 issued shares in the defendant company in the second suit, Vegas Industries Sdn. Bhd. ("Vegas"), which was the registered proprietor of two lots of land in Penang, namely Lot 1547 and Lot 1551 for which lay-out plans for a housing scheme had been submitted to the Majlis Perbandaran Pulau Pinang ("the Majlis") for its approval in December 1984. By an agreement dated 29 January 1985 between the defendants and Renong ("the agreement"), the defendants agreed to sell 71% of the shareholding in Vegas to Renong and although the agreement was structured as an agreement for the sale of shares it was in effect an agreement for the development of the two lots which at the material time had been charged to Malaysia British Assurance Berhad ("MBA") to secure a loan to Vegas of approximately RM1.8 million. On 29 July 1985 the lay-out plan for Lot 1551 ("D1") was approved on certain conditions which were unacceptable to Renong because, it avers, they constituted material conditions or variations in consequence of which the agreement was deemed to have been terminated *ipso facto*. Renong therefore claimed the return of the 30% of the purchase price amounting to RM475,416 which it had paid to the defendants. The defendants denied that the conditions attached to the approval were material conditions or variations entitling either party to repudiate the agreement and prayed for specific performance of the agreement or, alternatively, for indemnification against all loss and damage by way of diminution on the return of their shareholdings in Vegas. No defence was filed by Vegas in respect of the second suit.

It is common ground that nothing turned on the approval relating to Lot 1547 and that the entire case of the plaintiff revolved round the requirements of the various departments as stipulated in the annexures to the letter of conditional approval dated 29 July 1985 emanating from the Majlis ("the approval letter"). The English translation of the approval letter is reproduced as follows:

Majlis Perbandaran Pulau Pinang

Your ref:
Our ref: L.P. 3105(LB)
Date 29 July 1985

Messrs Lim & Associates
117 Jalan Anson
Penang

Sir,

Layout Plan No. 3105(LB) - Proposal for 2 Blocks of Low-Cost Flats 12 Storeys (415 Units) on Lot 1551, MK 12, DBD Batu Maung Highway, Penang

1. I refer to the **layout plan** above which was submitted by you and am happy to inform that the proposed development has been approved by the (Majlis) Council in principle **subject to conditions as follows**:

   a. requirements of the Building Dept. (Annexure A), Engineering Dept. (Annexure B), Health Dept. (Annexure C), Town Planning Dept. (Annexure C) of the MPPP must be complied with before the plan is released;
   b. the requirements of Public Works Department (JKR), JPT, PBA, Fire Department and Telecoms and Civil Aviation Department must be complied with before the plan is released;
   c. 96 units of the low-cost flats must be reserved for bumiputras only and sold at the price of RM25,000 in accordance with the conditions of the State Authorities as contained in the letter of the State Secretary dated 3 September 1984; (reference PSUK/PP/004.9.1.1).

2. The Council has also decided to impose by way of a directive, a requirement that

developers must resolve the question concerned with compensation or relocation money satisfactorily to the squatters/tenants of the existing houses before any building works can begin.

3. **This approval is valid for the period of 12 months from the date hereof. The official approval of this Layout Plan will be validated and released after all requirements and conditions have been complied with. You must also forward the Building Plan which complies with all requirements and conditions within the 12 month period for approval.** If action on these two matters are not taken then the valid period of approval for 12 months will expire unless extension is given by the Council.
4. Together with this is returned 5 copies of the said plan for your action.

(Signed)

(emphasis added)

Renong was apprised of the contents of the approval letter and wrote to the first defendant on 8 August 1985 as follows:

Dear Cik Roslin,

Re: Lay-out Plan No. 3105(LB) - Proposed 2 Block 13 Storey Low-Cost Flats (415 Units) On Lot 1551, Mk 12, D.B.D., Batu Maung Highway, Pulau Pinang.

Further to my letter to you of 1 August 1985 on the above matter I am directed to inform you that there are two major conditions of the conditional planning approval enclosed with your letter which are not acceptable to us. These are:

1. Under the Building Department: Conditions 1, 3 and 7. We suggest that an appeal be made to the City Council that a temporary access be allowed through the present JKR road until the access road through Lot 1552 is available.
2. Under the Engineering Department: Conditions 2, 5 and 7. An appeal is to be made that the drains should cater for Lot 1551 only. The appeal should also include that the drainage through Lots 433, 434, 462 and 427 should be an earth drain pending and until development of these lots by their owners. Please see conditions 5 and 7.

You will appreciate that Clause 4.01(c) of the Agreement of Sale and Purchase stipulates that the conditions of the planning approval must be acceptable to the purchaser.

In the light of the above, I am directed to request you to file your appeal as early as possible so that the matter can be satisfactorily resolved before 28 September 1985 as provided by Clause 4.01(c) of the agreement.

(Signed)

For convenience the English translation of the relevant conditions imposed by the Building Department and the Engineering Department appearing in the annexures to the approval letter which were unacceptable to Renong is reproduced as follows:

Annexure A

Requirements of the Building Department

1. To have valid access of 40' 0" from Jalan Permatang Damai Laut to site.
2. ...
3. I propose that access be provided to Lot 1552.
4. ...
5. ...
6. ...
7. Since there are no drains in the area at present the architect must show the outflow of the drains for this housing scheme to the point where the outflow ends. Approval from owners of neighbouring lands must be obtained where the outflow drains cross other lands.

Annexure B

Requirements of the Engineering Department

1. ...
2. The letter from the Drainage and Irrigation Dept. is required to confirm whether Lot 1551, MK 12 DBD Penang is within the "drainage catchment" to the existing monsoon drains at Lot 1072 MK 12 DBD Penang. If it is, all water from this development must flow to that monsoon drain. Otherwise, an alternative water outlet must be proposed and shown in the plan.
3. ...
4. ...
5. The Consulting Engineers must also forward the plan and the drainage calculations for this development and also for Lots 1551, 433, 434, 462 and 427 to our department for comment before the layout plan is approved. The calculation including size of drains and "catchment areas" must be enclosed.
6. ...
7. The Consulting Engineers are required to forward the structural calculations for the plan of the main monsoon drain as well as other structures concerned to the Council before building works begin. The proposal for the main monsoon drain must be built with reinforced concrete.

It is to be noted that the conditions and variations which were unacceptable to Renong relate to access and drainage.

By letter dated 2 October 1985 Renong gave notice of the termination of the agreement in the following terms:

Dear Cik Roslin,

Re: Sale and Purchase Of Shares Agreement Between Roslin Abdul Aziz And Baharum Abdul Rahman (Collectively As "Vendors") And Renong Berhad (As "Purchaser")
Dated 29 January 1985

I am directed by the Board of the company to write as follows.

Further to the letter from Vegas Industries Sdn. Bhd. to you of 30 July 1985 on the above matter, we have to point out to you that pursuant to Clause 10.01 of the agreement of Sale and Purchase of shares, the said agreement is terminated *ipso facto* and shall be null and void.

You have failed to comply with the terms of Clause 4.01 (c) in that you have not obtained the approval of the layout plans in respect of Lot 1551 Mukim 12, South West District, Penang acceptable to us within the time stipulated under the said agreement. Therefore, the said agreement is terminated as aforesaid.

Pursuant to the terms of Clause 10.01, all moneys paid to you or on your behalf are to be returned to us forthwith. Accordingly, we are to demand from you repayment of the sum of RM1,412,243.65 in full forthwith failing which, we regret, the company will have to proceed to seek ways and means to recover such moneys.

Under the terms of the said agreement the Company's nominees on the Board of Vegas Industries Sdn. Bhd. will resign and perform all the other consequential matters as soon as you repay all moneys due to us.

Yours faithfully,
Renong Berhad

(Signed)

It was not disputed that after the extension granted by Renong the agreement was to expire only on 28 September 1985 and that the "requirements" imposed by the Building and Engineering Departments were "conditions" as envisaged by the parties in s. 4.01 of the agreement. What was in issue was whether the requirements or conditions which were unacceptable to Renong come within the meaning particularly of the provisions of s. 4.01(c) of the agreement as being "material" entitling Renong to terminate the agreement under the provisions of s. 10.01 thereof.

The relevant provisions relating to approval of the lay-out plan and termination of the agreement contained, as mentioned, in s. 4.01 and s. 10.01 respectively were worded as follows:

Section 4.01 Conditions Precedent

It is hereby expressly agreed confirmed and declared by the parties hereto that notwithstanding anything to the contrary herein contained, this Agreement is conditional upon the following conditions precedent being fulfilled:

(a) ...
(b) ...
(c) **that approval for the layout plans be obtained** in respect of Lot 1547 and Lot 1551 Mukim 12, South West District, Penang **by not later than six (6) months from the date hereof (or a further extension of two (2) months, if so required)** Provided that such approved layout plans shall contained (sic) not less than 610 units of 3-room apartments; Provided Always and notwithstanding anything to the contrary herein contained it is hereby agreed and declared that if any of the approvals aforesaid are obtained subject to any **material conditions or variations,** such conditions or variations will have to be **mutually acceptable to the Vendors and the Purchaser** and if the Vendors or the Purchaser as the case may be, **in their respective discretion** does not agree to accept any of such conditions and or variations pertaining to any of the aforesaid approvals then that particular approval shall not be considered to an approval for the purposes of this s. 4.01.

(emphasis added)

Section 10.01 **Events for Termination**

Upon the happening of any of the following events, *viz*:

(a) the approvals as provided under s. 4.01 (a) and (c) hereof not being obtained within periods specified therein of this Agreement;
(b) ...

then in any of the aforesaid cases this Agreement shall be terminated *ipso facto* and shall be null and void and neither party hereto shall have any claims against the other save and except for any antecedent breach. And the Vendors shall forthwith returned *(sic)* to the Purchaser free of interest all monies heretofore paid by the Purchaser to the Vendors. And the Purchaser shall cause the person or persons nominated by it to be on the Board of Directors of the Company as provided under s. 5.01(c) hereof to resign and to hand back the management and control of the Company to the Vendors without being made liable for any losses for any acts or omissions except if it has acted *mala fide*

Typical of litigation in the law of contract, the determination of the issue in these proceedings as to whether the approvals for Lot 1551 as provided for in s. 4.01(c) were obtained within the deadline 28 September 1985 was a matter of construction and in these proceedings lay simply in the interpretation of the proviso to s. 4.01.

It was the contention of Renong that the words "material conditions or variations" must be accorded their ordinary meaning in the proviso and that the expressions "mutually acceptable to the Vendors and Purchaser" and "in their respective discretion" therein were intentionally and deliberately inserted to reflect the intention of the parties that either of them should have the right to withdraw from the agreement should it arrive at its own conclusion that any condition or variation was material and that accordingly the test to be applied in ascertaining whether the conditions or variations attached to the approval letter were acceptable or not was a subjective test.

On the other hand, it was the contention of the defence that on the true construction of the provisions of the proviso, the test was an objective one, i.e. whether any reasonable person or developer would consider the conditions as "material" and not as "normal, standard ones".

I considered the oral evidence that was adduced in this case, particularly that adduced on behalf of the defence but derived very little assistance from it with regard to the construction to be placed on the words in the proviso. There was, in my view, no ambiguity in the language that was used in the proviso which had been plainly worded to mean that if either party was of the view as a matter of subjective reality that the condition or variation was material it was entitled to put an end to the agreement and have its money back. That this was the understanding of the parties was, to my mind, clearly evidenced by, *inter alia*, the first defendant's letter dated 30 July 1985 (DB46) which is reproduced as follows:

> 30 July 1985
>
> Vegas Industries Sdn. Bhd.
> 5th Floor Wisma Tek Lee
> 38 Jalan Tun Perak
> Kuala Lumpur
>
> Dear Sirs
>
> Application To Put Up Low-Cost Houses On Lot 1551
>
> Sale & Purchase Agreement Between Roslin Abdul Aziz And Baharum Abdul Rahman And Renong Berhad Dated 29 January 1985
>
> In connection with the above, I have pleasure in enclosing herewith the planning approval from City Council Penang.
>
> Please indicate whether the conditions **are acceptable to you**.
>
> I should be grateful to have your reply as soon as possible.
>
> Yours faithfully
>
> sgd.
> Roslin Abdul Aziz
>
> (emphasis added)

I did not accept the contention of the defence that if a condition or variation was normal or standard it could not be material. I did not think the adjective "material" had acquired the aura of a term of art. I considered it a term which, in ordinary parlance, was meant (according to the standard dictionary definition) to describe something as "substantial", "essential", "relevant" or "significant". I took the view that so long as either party genuinely considered a condition or variation as material it must be viewed as a substantial condition or variation.

I accepted Renong's contention that in so far as the question of access was concerned, the conditions did impose an obligation on the part of the developer to upgrade the access road by widening it to 40 feet from Jalan Permatang Damai Laut to the site and also to provide access to the adjoining Lot 1552 (all of which would entail extra financial expenditure and additional physical effort on the part of Renong to fulfil those requirements), and I was of the view that it was within the subjective discretion of Renong to regard these as material conditions in the absence of any evidence of capriciousness, dishonesty or bad faith on the part of Renong each of which elements would on the authorities nullify genuine dissatisfaction on the part of Renong: see *Andrews v. Belfield* [1857] 2 CBNS 779; *Diggle v. Ogston Motor Company* [1915] 84 LTR Vol. 112 1029; *Docker v. Hyams* [1969] 1 WLR 1060.

As regards drainage, the lay-out plan D1 contained a mere notation that the drainage would flow into Lot 1549 and end up in Iping Garden whereas the evidence of the architect (DW2) indicated that this proposal was not feasible because the permission of the owner of Lot 1549

had first to be obtained giving rise to uncertainty in the implementation of the development project. Further it was obvious that when the Engineering Department required drainage calculations for Lots 433, 434, 462 and 427 for consideration before final approval of the D1, approval could not by any stretch of the imagination be said to have been obtained within the stipulated time in respect of drainage quite apart from the considerable cost that would be incurred by Renong in developing the drainage system if it had been so required by the Engineering Department. I agreed with the submission of Counsel for Renong that consequently the satisfaction of this requirement was a condition or variation which could be considered as material by Renong. Counsel for Renong drew my attention again to *Docker v. Hyams (supra)* where the English Court of Appeal faced with a similar interpretational situation considered a number of authorities and came to the conclusion that "where the condition is that something is to be done to A's approval or to his satisfaction, then he is the judge, and as long as he is honest, he need not be reasonable". I must say I agreed with Counsel for Renong when he submitted that the circumstances of the present case completely negated any suggestion of capriciousness, bad faith or dishonesty on the part of Renong particularly as evidenced by Renong's letter agreeing to an extension of two months until 28 September 1985 for the procurement of the approval of D1 (AB47) and by Renong's request to the first defendant to appeal against the requirements imposed by the Building and Engineering Departments well before the expiry date of the agreement.

In the result, I was of the considered view that as regards the first suit, the agreement was deemed to have been terminated *ipso facto* and, as the defence had conceded that the cheque of RM158,472 was received, the defendants were ordered to return to Renong the 30% of the purchase price amounting to RM475,416 with interest at the rate of 12% per annum from 2 October 1985 up to the date of realisation. I also ordered costs to be paid by the defendants.

As to the counter-claim, in the light of my finding on Renong's claim it necessarily had to fail by virtue of s. 10.01 providing for automatic termination and specific performance obviously could not lie. Nor, in my view, could the defendants' alternative prayer in the counter-claim for indemnification against all loss and damage by way of diminution on the return of their shareholdings in Vegas be sustained as I agreed with Counsel for Renong that such a claim could only be made by Vegas and not the shareholders: see *Prudential Assurance Co. Ltd. v. Newman Industries and Ors.* (No.2) [1982] 1 Ch. 204. The counter-claim was accordingly dismissed with costs.

With regard to the second suit, no defence had been filed but it was pleaded that when the agreement was entered into it was a term of the agreement that Renong would take over the management of Vegas, that whilst it had management of Vegas, Renong advanced monies totalling RM936,827.65 to Vegas in contemplation of Renong acquiring a controlling interest in Vegas and that there had been a total failure of consideration entitling Renong to the return of the monies advanced. However, evidence was led to show through the company secretary of Renong (PW2) by means of the debit balance at PB7 that payments amounting only to RM562,491.30 were made for or on behalf of Vegas and I accordingly entered judgment only for this amount with interest at the rate of 12% per annum from 2 October 1985 up to the date of realisation. I also ordered costs to be paid by Vegas.